

No. _____

05-601 NOV 9 - 2009

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In The

Supreme Court of the United States

BUTLER COUNTY FAMILY YMCA,

Petitioner,

VS.

CHERIE HUGH,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- I. Whether the Third Circuit Court of Appeals has erred in holding that an employee proceeding under a Title VII gender discrimination suit need not prove she was objectively qualified for the position from which she was terminated when the employer had promoted the employee to that position?
- II. Whether various Circuit Courts have inconsistently evaluated an employee's showing of objective qualifications in Title VII claims such that exercise of this Honorable Court's supervisory power is necessary?

CORPORATE DISCLOSURE STATEMENT

Petitioner, Butler County Family YMCA, has no parent corporations or publicly held companies owning 10% or more of their stock.

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Hugh v. Butler County Family YMCA, 418 F.3d 265 (3d Cir. 2005). The District Court did not publish an opinion in this case. Its opinion is reprinted in the Appendix at App. 11.

BASIS FOR SUPREME COURT JURISDICTION

The Court of Appeals for the Third Circuit entered its judgment on August 12, 2005. See Appendix 1. Petitioner, Butler County Family YMCA, seeks review of that judgment on a Writ of Certiorari. The present Petition is timely filed under 28 U.S.C. § 2101 and under Rule 13.1 of this Court.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) to review on a Writ of Certiorari the judgment of a federal Court of Appeals.

STATUTORY PROVISIONS INVOLVED

Title VII provides in relevant part:

42 U.S.C.A. § 2000e-2

(a) Employer practices

It shall be an unlawful employment practice for an employer –

- (1) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment,

because of such individual's race, color, religion, sex, or national origin; or

- (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

This is a Title VII gender discrimination suit filed by Cherie Hugh. In January of 1998 Ms. Hugh was hired by the Butler County Family YMCA as a volunteer recruiter for its Big Brothers/Big Sisters Program. She held that position until approximately June of 1999 when she became the volunteer coordinator for the Big Brothers/Big Sisters Program. In both positions, she was a volunteer. In May of 2000, Ms. Hugh was promoted to the Director of the Big Brothers/Big Sisters Program. She was promoted because the Butler County Family YMCA recognized her loyalty to the program and wanted to give her the opportunity to serve as its Director. The objective requirements for the position of Director of Big Brothers/Big Sisters Program included a social work degree and one (1) year experience as a caseworker. Ms. Hugh admittedly did not possess these objective job qualifications.

Prior to promoting Ms. Hugh to the Director of Big Brothers/Big Sisters Programs, there was a concern about her ability to effectively lead its advisory counsel which

was also a requirement of this position. During the one (1) year period wherein Ms. Hugh served as the Program's Director, she failed to fulfill the required responsibilities. In April of 2001, she was terminated from her position as the Director of the Big Brothers/Big Sisters Program.

Ms. Hugh subsequently filed suit alleging that her termination was in violation of Title VII of the Civil Rights Act, codified at 42 U.S.C. § 2000(e) *et seq.*, as well as the Pennsylvania Human Relations Act, codified at 43 Pa. C.S.A. § 951 *et seq.* After discovery closed, Butler County Family YMCA filed a Motion for Summary Judgment in the United States District Court for the Western District of Pennsylvania. Butler County Family YMCA averred that Ms. Hugh failed to establish a *prima facie* case as required under Title VII since she admittedly did not possess the objective job qualifications for the position of Director. The District Court granted this Motion for Summary Judgment and Ms. Hugh appealed.

On appeal, the United States Court of Appeals for the Third Circuit reversed the District Court's decision and remanded this case for further proceedings. In its holding, the United States Court of Appeals for the Third Circuit held that when the Butler County Family YMCA promoted Cherie Hugh from a volunteer position to the Director of the Big Brothers/Big Sisters position, Ms. Hugh was automatically deemed objectively qualified for the Director position. Specifically, the Court of Appeals has held that satisfactory performance of duties, subsequently leading to a promotion to a different position, establishes the employee's objective qualifications for the promoted to position. This holding not only eviscerates the long standing requirements of a *prima facie* case set forth under Title VII, but creates a disincentive for employers to promote its

employees from within. Given the important legal and social ramifications of the Court of Appeals' decision, exercise of this Court's supervisory power is necessary.

REASONS FOR GRANTING THE WRIT

- I. This Court should exercise its supervisory power to resolve the important issue of whether or not a promoted employee must establish her objective qualifications for the promoted position when proceeding under a discrimination suit under Title VII.
 - II. This Court should exercise its supervisory power to resolve the inconsistent standards utilized by courts to determine if an employee has established her objective qualifications for the position in order to establish a *prima facie* case of discrimination.
-

ARGUMENT

- I. **THE COURT OF APPEALS ERRED IN HOLDING THAT SATISFACTORY PERFORMANCE OF DUTIES, SUBSEQUENTLY LEADING TO A PROMOTION TO A HIGHER POSITION, ESTABLISHES A TITLE VII PLAINTIFF'S OBJECTIVE QUALIFICATIONS FOR THE HIGHER POSITION.**

The United States Supreme Court should overrule the Court of Appeals' precedential holding that satisfactory performance of duties, subsequently leading to a promotion to a different position, establishes a Title VII plaintiff's objective qualifications for a position. This new holding significantly departs from the *McDonnell Douglas* framework that has been utilized for the past 33 years.

This new holding also leads to a significant adverse impact on employers and employees alike that, in essence, does not encourage promotion from within.

This Court set forth elements that a Title VII plaintiff must establish. These are:

1. The plaintiff belongs to a minority;
2. that the plaintiff applied for **and was qualified** for the position;
3. that despite the qualifications, that she suffered adverse employment action; and,
4. after the adverse employment action, the position remained open and the employer continued to seek applicants from persons of plaintiff's qualifications.

See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817 (1973). Instantly, the Court of Appeals has essentially held that an employee who is promoted from within to a higher position is automatically deemed qualified for that position. It appears that the basis for the Court of Appeals' decision is that an employee who works for a long period of time for an employer is "deemed qualified" by virtue of time spent working in a certain position. The problem with this holding is that it overlooks that employees are typically promoted to more difficult positions that require more responsibility, insight and skill. While that employee may have been qualified for the lower position by virtue of the time spent in the lower position, it does not follow that the employee is automatically qualified for the higher, more complex position.

The Court of Appeals' holding will have an adverse effect on employers and employees alike. Employers will

be more reluctant to promote from within to give their employees the opportunity and incentive to climb up the corporate ladder. Why would an employer promote an employee and give that employee a chance to succeed at a higher position if courts subsequently deem that employee objectively qualified simply because she was promoted to that position? When an employee readily admits that she does not possess the known objective job qualifications for a position, the courts can not step in and deem her objectively qualified based upon other criteria.

Likewise, when an employee readily admits that he or she does not possess the objective job qualifications for a position from which she is discharged, she does not establish a prima facie case sufficient to proceed with her discrimination claims under Title VII. To hold otherwise would erode the 33-year test implemented by *McDonnell Douglas, supra*, and followed by the courts.

The Court of Appeals decision is clearly in conflict with this Honorable Court's longstanding test outlined in *McDonnell Douglas*. Moreover, the Court of Appeals' holding has a significant adverse impact on employers and employees in that it discourages promotion of employees based upon loyalty and years of service.

II. THERE ARE INCONSISTENCIES AMONG THE CIRCUITS WHEN DETERMINING WHETHER AN EMPLOYEE HAS ESTABLISHED HER OBJECTIVE QUALIFICATIONS IN TITLE VII CASES.

Subsequent to the *McDonnell Douglas* holding, various courts have visited the issue of determining an employee's objective qualifications for purposes of establishing a prima

facia case. The **First Circuit** has held that a plaintiff claiming discriminatory termination needs to show that he or she was "qualified" in the sense that she was doing the job well enough to rule out the possibility that he or she was fired for inadequate job performance. See *Loeb v. Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979). The **Second Circuit** has held that a plaintiff must show that he or she possesses the basic eligibility and not that she was satisfactorily performing her duties. See *Slattery v. Swiss Reinsurance American Corp.*, 248 F.3d 87 (2d Cir. 2001).

The **Third Circuit** has now held that a plaintiff's qualifications are determined by an objective standard and that satisfactory performance of duties over a long period of time that lead to a promotion clearly establish "objective" qualifications to the promoted position. See *Jalil v. Advel Corp.*, 873 F.2d 701 (3d Cir. 1989), *cert. denied*, 493 U.S. 1023 (1990); *Sempier v. Johnson & Higgins*, 45 F.3d 724 (3d Cir.), *cert. denied*, 515 U.S. 1159 (1995); *Hugh v. Butler County Family YMCA*, 418 F.3d 265 (3d Cir. 2005).

The **Fifth Circuit** has held that a plaintiff must show that she possessed the necessary qualifications for the job at the time of the adverse action. See *Bienkowski v. American Airlines, Inc.*, 851 F.2d 1503 (5th Cir. 1988). The Fifth Circuit has also held that in failure to hire cases, an employer may establish objective requirements and rely upon them in arguing that a prima facie case is not established because the employee is not qualified. See *Johnson v. Louisiana*, 351 F.3d 616 (5th Cir. 2003).

There is somewhat of a dichotomy in the **Sixth Circuit**. There, the courts have held that for a plaintiff to prove that she is qualified under the second prong of the prima facie case, she must prove that she was performing

at a level which met the employer's legitimate expectations. See *McDonald v. Union Camp Corp.*, 898 F.2d 1155 (6th Cir. 1990). Later in *Farrette v. Cuyahoga*, the Sixth Circuit held that at the prima facie stage, the court should focus on the plaintiff's objective qualifications to determine if she is qualified for the position. 105 Fed. Appx. 722 (6th Cir. 2004). The prima facie burden of showing a plaintiff is qualified can be met by presenting evidence that her qualifications are at least equivalent to the minimum objective criteria required for employment. *Id.*

The **Eighth Circuit** has held that an employee must show that her qualifications are equivalent to the minimum objective criteria. According to the Eighth Circuit, such qualifications are demonstrated when the employee actually performs her job at a level that meets her employer's legitimate expectations. See *Kratzer v. Rockwell Collins, Inc.*, 398 F.3d 1040 (8th Cir. 2005).

As demonstrated, the Circuits are producing different standards to determine a plaintiff's objective qualifications when evaluating prima facie showing or lack thereof. Some require an employee to simply show that she was meeting an employer's "legitimate expectations." Other Circuits require the employee to show that she possessed the objective qualifications for the job. Based upon these inconsistencies, this Honorable Court should grant certiorari.

CONCLUSION

For all the reasons above, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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App. 1

PRECEDENTIAL

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

No. 04-1459

CHERIE HUGH,

Appellant

v.

BUTLER COUNTY FAMILY YMCA

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. No. 01-cv-02179)

District Judge: Honorable Maurice B. Cohill, Jr.,

Argued on 1/11/05

Before: ROTH, and CHERTOFF*, *Circuit Judges*
and SHAPIRO**, *District Judges.*

(Opinion filed: August 12, 2005)

* Judge Chertoff heard oral argument in this case but resigned prior to the time the opinion was filed. The opinion is filed by quorum of the panel. 28 U.S.C. § 46 (d).

** Honorable Norma L. Shapiro, District Judge for the United States District Court for the Eastern District of Pennsylvania sitting by designation.

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OPINION OF THE COURT

ROTH, Circuit Judge:

This case is an appeal from the District Court's grant of summary judgment for Defendant Butler County Family YMCA in a gender-based employment discrimination suit brought by a former employee, Cherie Hugh.

I. Jurisdiction and Standard of Review

The District Court had subject matter jurisdiction of this case pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 *et seq* and 28 U.S.C. § 1331. We have appellate jurisdiction pursuant to 28 U.S.C. § 1291.

We exercise plenary review over the District Court's grant of summary judgment and apply, *de novo*, the same standard that the District Court applied. *Doe v. Cty. of Centre, Pa.*, 242 F.3d 437, 446 (3d Cir. 2001). A grant of

summary judgment is appropriate where the moving party has established that there is no genuine dispute of material fact and "the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catlett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986) (citing Fed. R. Civ. P. 56(c)). Where the defendant is the moving party, the initial burden is on the defendant to show that the plaintiff has failed to establish one or more essential elements to her case. *Celotex*, 477 U.S. at 323-24. On a motion for summary judgment, a district court must view the facts in the light most favorable to the non-moving party and must make all reasonable inferences in that party's favor. See *Marzano v. Computer Sci. Corp.*, 91 F.3d 497, 501 (3d Cir. 1996).

To survive a motion for summary judgment, the non-moving party cannot solely rest upon her allegations in the pleadings, but rather must set forth specific facts such that a reasonable jury could find in the non-moving party's favor, thereby establishing a genuine issue of fact for trial. Fed. R. Civ. P. 56(e). While the evidence that the non-moving party presents may be either direct or circumstantial, and need not be as great as a preponderance, the evidence must be more than a scintilla. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

II. Background

In January 1998, Hugh was hired as a part time volunteer recruiter by the Butler County Family YMCA and, in June 1999, she was made a full time volunteer coordinator. In May 2000, she was named Director of the Big Brothers, Big Sisters program at the YMCA. In April

2001, Hugh was informed that she was being terminated for poor performance because she was lacking in leadership skills. Specifically, Hugh's supervisor stated that she was terminated because she had cancelled a meeting, because a sign for the program had not been completed, and because she had dressed inappropriately for a meeting. In neither the termination letter nor a subsequent termination meeting did the YMCA inform Hugh that she was being terminated due to her lack of qualifications for the position.

The YMCA's Employee Handbook specifically requires an employee's supervisor to attempt to resolve any problems and provide written notification prior to termination. Hugh received no negative performance reviews or criticisms, by written notification or otherwise, prior to her discharge. Hugh was replaced by a male employee at a higher salary than Hugh had been paid.

Hugh timely filed a complaint with the Equal Employment Opportunity Commission and received a right to sue letter in August 2001. She then filed this complaint seeking back pay, front pay, and compensatory damages.

III. Summary Judgment

In granting summary judgment for the YMCA, the District Court concluded that Hugh did not establish a *prima facie* case of discrimination because she admitted that she was not initially qualified for the position. The District Court did not reach the question of whether the YMCA's reasons for termination were pretextual. Hugh contends that the District Court erred in both regards. We agree.

To prevail on her Title VII claim, Hugh must initially prove a prima facie case by showing that she is a member of a protected class, qualified for the job from which she was discharged, and that others, not in the protected class, were treated more favorably, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-3, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). If Hugh establishes a prima facie case, the burden shifts to the YMCA to set forth a legitimate non-discriminatory reason for the discharge. *Id.* at 804-5. If the YMCA does so, then Hugh must show that the reasons asserted are a pretext for discrimination. To withstand a motion for summary judgment, Hugh must make a prima facie showing of discrimination and point to "evidence establishing a reasonable inference that the employer's proffered explanation is unworthy of credence. *Sorba v. Penn Drilling Co.*, 821 F.2d 200, 205 (3d Cir. 1987).

A. Prima Facie Case

The job description for Director of the Big Brothers, Big Sister program included the requirement that the applicant have a degree in social work and experience as a caseworker. The YMCA knew that Hugh did not have either of these qualifications when it hired her for the position. The YMCA states that it hired Hugh despite her lack of a degree and caseworker experience because it wanted to give her a chance to do the job, based on her experience in her previous positions with the YMCA. The YMCA argued to the District Court, and argues here, that because Hugh did not meet these qualifications, she was not qualified for the position and thus cannot present a prima facie case of discrimination.

The YMCA relies on a single case for the proposition that objective qualifications for a position should be considered in evaluating an employee's prima facie case. *Weldon v. Kraft, Inc.*, 896 F.2d 793 (3d Cir. 1990). In *Weldon*, there was no dispute over whether the employee possessed the background qualifications for the position for which he was hired. Rather, the employer contended that the legitimate reason for the employee's termination was that he did not possess subjective qualities such as leadership, productivity, and efficiency. We held that those subjective qualities were not a necessary part of the employee's prima facie case. Instead, these qualities were appropriately considered at the second stage of the analysis, when considering whether the lack of these qualities was a pretext for discriminatory termination. *Weldon*, 896 F.2d at 798-99. The holding in *Weldon* does not control the outcome here because of the difference in the facts of this case. Here, the issue is whether Hugh met the objective qualifications of the position for which she was hired and whether, having hired Hugh, the YMCA can now justify its termination by pointing to a lack of objective qualifications.

Contrary to the District Court's determination, we have found that satisfactory performance of duties, leading to a promotion, does establish a plaintiff's qualification for a job. *Jalil v. Avdel Corp.*, 873 F.2d 701, 707 (3d Cir. 1989). Although the facts of *Jalil* were not identical to those here, the principle is the same. The YMCA chose to promote Hugh, despite her lack of a degree and of case-worker experience. It is a fair inference that the decision to promote Hugh was based on her satisfactory performance in her two previous positions with the YMCA. Once the YMCA made this choice, it was deeming Hugh's prior

satisfactory performance sufficient qualification for the position of Director of the Big Brothers, Big Sisters program.

The YMCA, having promoted Hugh with full knowledge of her background, cannot now say that she was unqualified for the position, her promotion was an acknowledgment that she was qualified at the time. This conclusion would, of course, be different if Hugh had not disclosed information regarding her qualifications or if she had misrepresented her qualifications. There are no such facts here, and the YMCA admits that it had full knowledge of her background and qualifications. Thus, the District Court erred in concluding that Hugh did not establish a prima facie case because she admitted she did not meet the published qualifications for the Director position.

B. Reasons for Discharge

Having found that Hugh did not demonstrate a prima facie case, the District Court did not reach the question of whether the YMCA's reasons for termination were pretextual. The YMCA argues that even if a prima facie case has been established, the reasons for termination were legitimate and non-discriminatory. Our review of the record does not bear out such a conclusion.

When a plaintiff, who was hired despite not possessing the objective qualifications listed in a job description, does not subsequently adequately perform her job, the employer can terminate the employee for performance-based reasons. For that termination to be proper, however, it must not be based on discriminatory motives. For example, if a supervisor had filed reports of unsatisfactory

performance or had conversations with the employee about unsatisfactory performance before the termination occurred, that evidence would support a non-discriminatory finding. If, however, there was no such evidence and there was evidence of discriminatory behavior, then the employer's performance-based reasons could be found to be pretextual. If there are issues of fact with regard to either evidence of negative performance reviews or discriminatory behavior, then the determination of the disputed facts must go to the jury.

In this case, the record does not reflect any complaints or warnings to Hugh regarding her performance, despite the fact that the YMCA Employee Handbook requires supervisors to attempt to resolve problems through counseling or complaints prior to termination. In addition, Hugh has presented evidence of a series of interactions with her supervisors that suggest discriminatory motives. Specifically, the male members of the Advisory Council, the body to which Hugh reported, made program decisions without consulting Hugh, spoke around her at meetings, went to Hugh's male predecessor instead of her with questions, and generally treated Hugh with disrespect. In addition, the President of the Advisory Council refused to return Hugh's phone calls, a practice he did not engage in with Hugh's male predecessor. Finally, Hugh's male supervisor, who was also her predecessor, had a series of conversations with Hugh focusing on the difference her gender would make in her new position, and specifically told Hugh that she should not take over his responsibilities interacting with the local Rotary Club.

The YMCA contends that there were two reasons for Hugh's discharge. First, in its pleadings in this case, the YMCA stated that it terminated Hugh because she did not

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have the requisite qualifications for her position. As discussed above, an employer cannot choose to promote an employee despite a known lack of qualifications and then rely on the lack of those qualifications as a reason for termination. Rather, the YMCA must show reasons for terminating Hugh based on her performance in the position.

Second, when the YMCA terminated Hugh, she was told that she was being terminated for poor performance, specifically for cancelling a meeting, not wearing appropriate attire to a meeting, and failing to order a new sign for the program. Prior to her termination, Hugh was never approached regarding these problems. In addition, Hugh presents evidence that these reasons are not entirely supported by the record, including evidence that Hugh had made alternate arrangements for the meeting, which was ultimately cancelled by her supervisor, and evidence that Hugh did order the new sign, but it had not yet been delivered.

Thus, as Hugh has presented evidence supporting the reasonable inference that the YMCA's reasons for her termination are pretextual, there are issues of fact regarding the reasons for Hugh's termination. Viewing the evidence in Hugh's favor, there is far more than a scintilla of evidence supporting her claim that she was terminated for discriminatory reasons. Accordingly, it is proper for a jury to view this evidence and resolve whether Hugh was terminated for reasons based on her performance or based on discriminatory motives.

IV. Conclusion

For the reasons stated above, the District Court erred in granting summary judgment for the YMCA based on the finding that Hugh had not proven a prima facie case. The District Court's grant of summary judgment will be reversed and the case will be remanded to the District Court for proceedings consistent with this opinion.

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA**

CHERIE HUGH,)	
Plaintiff,)	
v.)	Civil Action
BUTLER COUNTY)	No. 01-2179
FAMILY YMCA,)	
Defendant.)	

Opinion

COHILL, D.J.

Plaintiff Cherie Hugh has filed this action against her former employer, Butler County Family YMCA, alleging that it terminated her employment because of her gender in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), as amended, 42 U.S.C. § 2001e *et seq.*, and the Pennsylvania Human Relations Act ("PHRA"), 43 Pa.C.S.A. § 951 *et seq.* We have jurisdiction over plaintiff's federal claim under 28 U.S.C. § 1331 and 42 U.S.C. § 2000e-5(f), and supplemental, jurisdiction over her state law claim under 28 U.S.C. § 1367.

Before the Court is defendant's motion for summary judgment (Doc. 16) and accompanying brief. Plaintiff has filed a response in opposition. Having considered the submissions of the parties and the applicable law, for the reasons set forth below we will grant summary judgment in favor of the defendant and dismiss this case.

Background

Plaintiff Cherie Hugh was hired by the defendant as a volunteer coordinator in January 1998, after working in this position through the Americor program. Hugh Dep. at 9-11. She worked part-time at that position until June of 1999, and then was hired to work full-time in the same position. Hugh Dep. at 12. In May of 2000, she was promoted to the position of Director of the Big Brothers/Big Sisters Program. Hugh Dep. at 12.

Hugh replaced Mike Johnson, who had been promoted to Director of Operations, and he remained her immediate supervisor. Hugh Dep. 24-26.

Her employment was terminated on April 10, 2001. Plaintiff was informed by letter from Michael Johnson that she was being discharged for poor performance. Johnson's letter stated that "[l]eadership skills are essential for this position; however your performance in this area is unacceptable." Def's Ex. C. Prior to that time, Hugh had not been counseled, disciplined, or notified of any performance issues.

Defendant subsequently hired a male to fill the position of Director of the Big Brothers/Big Sisters Program.

Hugh testified that at her termination meeting she was told that she was being discharged for cancelling a meeting on short notice, for allegedly violating the dress code when attending a meeting, and for failing to show leadership skills, Hugh Dep. at 51-52.

Hugh filed an administrative charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"), and received a "right to sue" letter on August

20, 2001 Pl.'s Ex 1 She timely filed this action, seeking back pay, front pay, compensatory damages, costs and fees.

Summary Judgment Standard

Summary judgment is proper where there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law, Fed. R. Civ. P. 56(c); *Childers v Joseph*, 842 F.2d 689 (3d Cir. 1989) "Rule 56 mandates the entry of summary judgment, after adequate time for discovery and upon motion, against the party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A court considering summary judgment must examine the entire record in the light most favorable to the nonmoving party, and draw all reasonable inferences in its favor *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986). The court must not engage in credibility determinations at the summary judgment state. *Simpson v Kay Jewelers, Div. of Sterling, Inc.*, 142 F.3d 639, 643 n. 3 (3d Cir. 1998) (quoting *Fuentes v. Perskie*, 32 F.3d 759, 762 n. 1 (3d Cir. 1994)).

The moving party bears the initial responsibility for demonstrating the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 325. An issue is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson*, 477 U.S. at 247. This burden may be met by showing that there is an absence of evidence to support the non-moving party's case. *Id.* at 325. However, once the moving party has properly supported its motion, the opponent must provide

some evidence that a question of material fact remains for trial. *Matushita Elec. Indus. Co v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). To meet this burden, the non-moving party may not rest upon mere allegations, general denials, or vague statements. *Bixler v. Central Penn. Teamsters Health & Welfare Fund*, 12 F.3d 1292 (3d Cir. 1993). The party opposing summary judgment must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matushita*, 475 U.S. at 486. In other words, the non-moving party must go beyond the pleadings and show, through its own affidavits or by the depositions, answers to interrogatories and admissions on file, the specific facts showing that there is a genuine issue for trial. *Celotex*, 477 U.S. at 324.

Discussion

A claim for discriminatory discharge on the basis of gender must be analyzed under the familiar burden-shifting framework set forth in *McDonnell Douglas Corp. v Green*, 411 U.S. 792, 802-03 (1973). Under that rubric, a plaintiff alleging gender discrimination must first set out a prima facie case of unlawful discharge to establish her claim, plaintiff must show that (1) she is a member of a protected class; (2) she was qualified for the position in question; (3) she was subjected to an adverse employment action; and (4) she was replaced by someone outside the protected class. *McDonnell Douglas*, 411 U.S. at 802-03. When evaluating the third prong of this test, the Third Circuit has directed that courts should consider whether a plaintiff meets objective job qualifications. *Weldon v Kraft, Inc.*, 896 F.2d 793, 798 (3d Cir. 1990). A prima facie case raises a presumption of unlawful discrimination.

If the plaintiff succeeds in stating a prima facie case of unlawful discharge, the burden of production shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse employment action. If defendant employer meets this burden, the presumption of discrimination drops from the case. Plaintiff must then show, by a preponderance of the evidence, that defendant's proffered reason for the employment action was a pretext for discrimination. *Id.* at 802; *St. Mary's Honor Ctr. V. Hicks.*, 509 U.S. 502, 506-508 (1993). A plaintiff may defeat a motion for summary judgment by pointing to "some evidence, direct or circumstantial, from which a factfinder would reasonably either: (1) disbelieve the employer's articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action." *Jones v. School District of Philadelphia*, 198 F.3d 403, 413 (1999) (quoting *Fuentes v. Perskie*, 32 F.3d 759, 764) (3d Cir. 1994), *Sheridan v. DuPont de Nemours and Co*, 100 F.3d 1061, 1067 (3d Cir. 1996) (en banc)).

Defendant contends that Hugh cannot make out a prima facie case of discrimination because she cannot show that she was qualified for the position.

The job description for the position Hugh held as Director of the Big Brothers/Big Sisters Program explains the required qualifications:

This position requires a Bachelor's Degree in social work (or equivalent Human Services field). One-year experience as a case worker or formal experience in this field is required. Applicant must also be knowledgeable of financial administrative skills, ability to employ, train and supervise employees and volunteers. Must also have

experience in casework interview process, human behavior and social work ethics. This position also requires the ability to organize a casework manual, phone skills, and to be organized. Excellent oral and written communication and human relation skills are necessary. Interpersonal skills, including an ability to work cooperatively and professionally with a variety of people are needed. The ability to motivate and direct others, as well as an ability to work independently are characteristics necessary for success.

Def.'s Ex. D.

Plaintiff was given a copy of this job description when she was interviewed for the job. Hugh Dep. at 17. At her deposition, Hugh admitted [sic] that she lacked one year of experience as a case worker, and that she did not have a degree in social work. Hugh Dep. at 17.

Hugh argues that the defendant knew her qualifications when it hired her for the position, and that her lack of experience and degree were not issues when she was hired. Hugh Dep. at 11-12. She also asserts that although she was not a caseworker, she had done some "casework duties." Hugh Dep. at 17. Without citing to any authority, her brief urges us to "find that the degree in social work and the caseworker experience are not essential requirements of the position." Pl's Br. at 12.

Hugh offers an explanation for each of the reasons she says defendant articulated for her termination: cancelling a meeting, being inappropriately dressed for a meeting, and failing to procure a sign. This, however, does not defeat summary judgment. A *prima facie* case is the threshold requirement for maintaining an employment discrimination claim, and Hugh has failed to meet her

burden in this regard. She cannot establish a prima facie case of discrimination because she admits that she was not qualified for the position.

Since we conclude that plaintiff has failed to establish a prima facie case, we need not reach Hugh's argument that defendant's proffered reasons for the employment decision are a pretext for discrimination. Nor do we reach plaintiff's claim for punitive damages.

Accordingly, we will grant defendant's motion for summary judgment and dismiss the complaint in this case in its entirety.

Conclusion

For the reasons set forth above, we agree with the defendant that plaintiff has failed to establish a prima facie case of gender discrimination. Summary judgment will be granted in favor of the defendant, and plaintiff's claims will be dismissed. An appropriate Order follows.

January 27, 2004
Date

/s/ Maurice B. Cohill, Jr.
Maurice B. Cohill, Jr.
Senior United States
District Judge

cc: Counsel of record

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

CHERIE HUGH,)	
Plaintiff,)	
v.)	Civil Action
BUTLER COUNTY)	No. 01-2179
FAMILY YMCA,)	
Defendant.)	

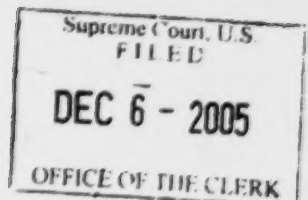
ORDER

AND NOW, to-wit, this 27th day of January, 2004, for the reasons set forth in the accompanying Opinion, it is hereby ORDERED, ADJUDGED, and DECREED that defendant's motion for summary judgment (Doc. 16) be and hereby is GRANTED.

Summary judgment be and hereby is granted in favor of the defendant and against the plaintiff, and the Clerk of Court be and hereby is directed to mark this case as "CLOSED."

/s/ Maurice B. Cohill, Jr. _____
Maurice B. Cohill, Jr.
Senior United States
District Judge

cc: Record Counsel



No. 05-601

IN THE
Supreme Court of the United States

BUTLER COUNTY FAMILY YMCA,

v.

CHERIE HUGH,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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**COUNTERSTATEMENT OF
QUESTIONS PRESENTED**

- I. Whether the Third Circuit Court of Appeals was correct in holding that an employer may not challenge an employee's objective qualifications for a position at the prima facie stage of an employment discrimination analysis when the employer hired or promoted that employee with full knowledge of the employee's qualifications or lack thereof?
- II. Whether the decisions of the various Circuit Courts are consistent on the issue of the showing an employee must make in order to establish that he or she is qualified for a position.

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COUNTERSTATEMENT OF THE CASE

Petitioner's Statement of the Case fails to include a number of facts that are material to the consideration of the questions presented and misstates the basis of the Third Circuit's holding. Respondent, Cherie Hugh, agrees that this is a Title VII gender discrimination suit filed by Ms. Hugh. Ms. Hugh was hired by the Butler County Family YMCA (YMCA) in January of 1998 as a volunteer recruiter for the Big Brothers/Big Sisters Program. In June of 1999, Ms. Hugh became the volunteer coordinator for this program. In May of 2000, Ms. Hugh was promoted to the position of Director of the Big Brothers/Big Sisters Program. The vacancy posting for this position stated that a social work degree and one (1) year experience as a caseworker were required for this position. When the YMCA promoted Ms. Hugh, it was fully aware that Ms. Hugh did not possess either qualification.

While the YMCA's president did express concerns concerning Ms. Hugh's ability to lead the advisory counsel, these concerns were based not on Ms. Hugh's lack of a social work degree or the full one (1) year experience as a caseworker but on the president's opinion, based on minimal contact, that Ms. Hugh did not have an outgoing personality. Despite these concerns, the YMCA's president was in support of Ms. Hugh's promotion.

In April of 2001, Ms. Hugh's employment was terminated. The reasons given for the termination were that Ms. Hugh had allegedly failed to order a sign for the program, that Ms. Hugh had allegedly dressed inappropriately for an advisory counsel meeting, and that Ms. Hugh had allegedly cancelled a new council member orientation meeting on short notice. Although Ms. Hugh did dispute the legitimacy and

veracity of these stated reasons, those facts are not germane to the questions presented here. What is relevant is that none of these stated reasons for Ms. Hugh's discharge are in any way related to a lack of a social degree or a lack of caseworker experience. Prior to her discharge, Plaintiff did not receive any form of performance based criticism, warning or counseling, despite the fact that the YMCA had policies in place requiring such. In fact, the YMCA's president was told that a warning had been given when he was asked to approve the discharge.

Ms. Hugh does not take issue with the YMCA's description of the proceedings below with the exception of its characterization of the holding of the Third Circuit Court of Appeals. Contrary to the YMCA's assertions, the Third Circuit did not hold that Ms. Hugh was automatically deemed objectively qualified based on satisfactory performance of duties subsequently resulting in promotion. Rather, the Third Circuit held that the YMCA, having promoted Ms. Hugh with full knowledge of her background, cannot now say that she was unqualified for the position, as her promotion was an acknowledgment that she was qualified at the time. The Third Circuit further noted that the conclusion would be different if Ms. Hugh had not disclosed information regarding her qualifications or had misrepresented her qualifications.

This holding is not only consistent with the long standing requirements of a prima facie case under Title VII, but in no way creates a disincentive for employers to promote its employees from within. Accordingly, the exercise of this Court's supervisory power is unnecessary.

REASONS FOR DENYING THE PETITION

As is clear from Rule 10 of this Court's Rules, a petition for a writ of certiorari will be granted only for truly compelling reasons. Here, it is undisputed that *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973) sets forth the analytical framework under which employment discrimination claims under Title VII of the Civil Rights Act of 1964 (Title VII) are decided. The Third Circuit's opinion in this case is consistent with both this framework and the logic and rationale behind it.

Furthermore, Rule 10 specifically states that a petition "rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." Here, it is undisputed that an employee must establish that she is qualified as part of the prima facie case of a Title VII employment discrimination claim. The Third Circuit's opinion merely holds that this element is established when the employer promoted the employee with full knowledge of her qualifications or lack thereof. While Ms. Hugh does dispute that this could be characterized as a "misapplication", it is undisputed that the underlying rule of law applied by the Third Circuit was properly stated.

Quite simply, the arguments advanced by the Petitioner in support of the writ fall short of justifying the exercise of this Court's supervisory power. Each of the Petitioner's arguments are addressed below.

I. THE THIRD CIRCUIT WAS CORRECT IN HOLDING THAT AN EMPLOYER, WHO PROMOTES AN EMPLOYEE WITH FULL KNOWLEDGE OF THE EMPLOYEE'S BACKGROUND, CANNOT THEREAFTER CLAIM AT THE PRIMA FACIE STAGE OF THE BURDEN SHIFTING ANALYSIS APPLICABLE TO TITLE VII CASES THAT THE EMPLOYEE WAS UNQUALIFIED FOR THE POSITION.

The United States Supreme Court should deny the petition for writ of certiorari as the Third Circuit's decision, unlike the proposition advocated by the Petitioner, is consistent with the precedent of this Court. In addition, contrary to the Petitioner's assertions, the Third Circuit's opinion does not have any adverse social ramifications.

In *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973), this Court established the burden shifting analysis used to decide employment discrimination claims under Title VII. At the first stage of this analysis, the employee must establish a prima facie case. This Court then set forth the elements that an employee must establish in the setting of a failure to promote or hire, which are accurately stated by the Petitioner. *Id.* at 802. This Court noted, however, that "[t]he facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations." *Id.* 411 U.S. at 802 n. 13. The elements necessary to establish a prima facie case in a setting in which an employee has been discharged for alleged cause, such as is involved here, differ somewhat, but still require as the second element that the employee prove that she was qualified for the position. See, *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507 (1993).

Once the employee establishes a prima facie case, the burden shifts to the employer to articulate a non-discriminatory reason for its actions. See *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 256-257, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981). If the employer meets this burden of production, the burden again shifts to the employee to prove that the employer's proffered reason is a pretext for discrimination. *Id.* 101 S. Ct. at 1094-1095.

In the instant case, the Third Circuit held that the YMCA, having promoted Ms. Hugh with full knowledge of her background, cannot claim at the prima facie stage of the analysis that she was unqualified for the position, as her promotion was an acknowledgment that she was qualified at the time.

The Petitioner claims that this holding "overlooks that employees are typically promoted to more difficult positions that require more responsibility, insight and skill." The Petitioner then claims that, as a result of this oversight, the Third Circuit's opinion will somehow have a chilling effect on employers' willingness to promote from within. This latter assertion is based on the assumption that, under the Third Circuit's holding, employers would be completely barred from challenging an employee's qualifications if the employee was promoted from within.

This argument represents a misapprehension of the analytical framework applicable to employment discrimination claims under Title VII. The Third Circuit's opinion merely prevents an employer from challenging an employee's objective qualifications at the prima facie stage of the litigation when the employer promoted or hired that employee with full knowledge of the employee's

qualifications. There is nothing in the Third Circuit's opinion that prevents an employer from asserting, as its non-discriminatory reason for its actions, that the employee lacked the requisite qualifications for the position. The employee would then be required to prove that these reasons were merely a pretext for discrimination. In short, the employer can still challenge an employee's qualifications when it promotes from within, it merely must do so at the pretext stage of the analysis. Thus, the Petitioner's warnings of dire social ramifications potentially resulting from the Third Circuit's opinion are without foundation.

The instant case is a perfect example of this in that the Third Circuit, after finding that Ms. Hugh had established a *prima facie* case, examined each of the reasons given by the YMCA for Ms. Hugh's discharge and concluded that there was sufficient evidence to establish that these proffered reasons were pretextual. In this regard, it should be noted that, despite the YMCA's posturing concerning an employer's ability to terminate an employee for lack of qualifications, none of the alleged performance deficiencies given by the YMCA for Ms. Hugh's termination, specifically that Ms. Hugh had allegedly failed to order a sign for the program, that Ms. Hugh had allegedly dressed inappropriately for an advisory counsel meeting, and that Ms. Hugh had allegedly cancelled a new council member orientation meeting on short notice, bear any relation to the objective qualifications at issue, i.e. the lack of a degree in social science and lack of one year of caseworker experience. In fact, the evidence in this case supports a finding that Ms. Hugh's performance of the actual duties of her position was satisfactory.

The Petitioner also argues that the Third Circuit's opinion is in conflict with this Court's holding in *McDonnell Douglas*

Corporation v. Green, 411 U.S. 792 (1973). It is difficult to perceive how this could be so when this Court stated in *McDonnell Douglas* that, "We note that the issue of what may properly be used to test qualifications for employment is not present in this case." *Id.* at 802 n. 14. It should also be noted that this Court has consistently maintained that the prima facie burden is not onerous, that its requirements are minimal, and that it was never intended to be rigid mechanized or ritualistic. See *Burdine*, 450 U.S. at 253; *Hicks*, 509 U.S. at 506; *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978).

Furthermore, it is the Petitioner's proposition that is in conflict with the precedent of this Court and the primary purposes of Title VII. Specifically, under the scenario proposed by the Petitioner, every employee promoted from within despite a known lack of objective job qualifications will be effectively denied the protection of Title VII as such employees will never be able to proceed beyond the prima facie case stage of the analytical framework. This would be true regardless of how long the employee successfully performed the duties of the position or whether the reasons for adverse employment decision were related to the possession of the qualifications.

From the foregoing, it is apparent that the Third Circuit's opinion, unlike the contrary result urged by Petitioner, is consistent with the precedent from this Court and the purposes of Title VII. Accordingly, this Court's exercise of its supervisory powers is not justified in this case.

II. THE DECISIONS OF THE VARIOUS CIRCUIT COURTS ARE CONSISTENT ON THE ISSUE OF THE SHOWING AN EMPLOYEE MUST MAKE IN ORDER TO ESTABLISH THAT HE OR SHE IS QUALIFIED FOR A POSITION.

A review of the cases cited by the Petitioner in support of its argument that the Circuit Courts are inconsistent on the question of the showing an employee must make to prove that he was qualified for the position in question reveal that the Petitioner's argument is more illusion than substance.

The cases cited by the Petitioner fall within two basic categories. First, are those cases which focus on the employee's performance at the job in question including *Loeb v. Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979), *Slattery v. Swiss Reinsurance American Co.*, 248 F.3d 87 (2d Cir. 2001); *Sempier v. Johnson & Higgins*, 45 F.3d 724 (3rd Cir. 1995), cert. dn'd, 515 U.S. 1159, 115 S. Ct. 2611 (1995); *McDonald v. Union Camp Corp.*, 898 F.2d 1155 (6th Cir. 1990), and *Kratzer v. Rockwell Collins, Inc.*, 398 F.3d 1040 (8th Cir. 2005). Second, are those cases requiring that the employee show that he or she meets the basic eligibility requirements for the position including *Bienkowski v. American Airlines, Inc.*, 851 F.2d 1503 (5th Cir. 1989).

The reason that the difference between these two categories is illusory was best stated by the Second Circuit in *Slattery*:

As an initial matter, the district court overstated the requirements for a *prima facie* case. Instead of requiring *Slattery* to demonstrate that he was "qualified for the position," *id.*, it demanded a

showing that "he was performing his duties satisfactorily." We have ourselves used similar language. See *McLee v. Chrysler Corp.*, 109 F.3d 130, 134 (2d Cir. 1997). But in doing so we have not, of course, raised the standard set by the Supreme Court for what suffices to show qualification. See *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254, (1981); see also *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 358 n. 44 (1977). Thus a mere variation in terminology between "qualified for the position" and "performing . . . satisfactorily" would not be significant so long as, in substance, all that is required is that the plaintiff establish basic eligibility for the position at issue, and not the greater showing that he satisfies the employer. The qualification prong must not, however, be interpreted in such a way as to shift onto the plaintiff an obligation to anticipate and disprove, in his *prima facie* case, the employer's proffer of a legitimate, non-discriminatory basis for its decision. As we have repeatedly held, the qualification necessary to shift the burden to defendant for an explanation of the adverse job action is minimal; plaintiff must show only that he "possesses the basic skills necessary for performance of [the] job." *Owens v. New York City Housing Auth.*, 934 F.2d 405, 409 (2d Cir. 1991) (internal quotation marks omitted). As a result, especially where discharge is at issue and the employer has already hired the employee, the inference of minimal qualification is not difficult

to draw. See *Gregory v. Daly*, __ F.3d __, 2001 WL 293086, at *8-9 (2d Cir. Mar. 27, 2001).

Slattery, 248 F.3d at 93.

Incidentally, although the Petitioner characterizes the *Slattery* opinion as requiring that an employee show basic eligibility for the position, the Second Circuit determined that the plaintiff was qualified based on the fact that he had been performing the duties of the position for seven years. *Id.*

The reason that the focus is on the employee's performance rather than the question of whether the employee meets the requirements initially stated by the employer at the time of hire, was stated as follows by the Court in *Loeb*:

We can assume that, unless the employee's job has been redefined, the fact that he was hired initially indicates that he had the basic qualifications for the job, in terms of degrees, certificates, skills and experience.

Loeb, 600 F.2d at 1013 n. 10.

The Fifth Circuit's opinion in *Bienkowski* was merely an extension of the assumption set forth by the First Circuit in *Loeb*. In *Bienkowski*, the Fifth Circuit cites to *Loeb* for the proposition that an employee's initial qualification for the position in question can be assumed from the fact that he was hired. The Fifth Circuit then stated that, given this assumption, the employee need only show that he had not lost the initial qualification through physical handicap, loss of professional license, or some other occurrence that

rendered him unfit for the job in order to establish that he was qualified for the position at the time of termination. *Bienkowski*, 851 F.2d at 1506 n. 3.

From the foregoing, it is apparent that all of the Circuit Courts logically assume that an employee met the initial requirements for the position by virtue of the fact that he was hired for it. The Circuit Courts then look to indicia of continued qualification, such as the employee's performance or lack of an occurrence that renders the employee unqualified, to determine whether the employee remained qualified at the time of discharge. Accordingly, the Circuit Court's opinions on this issue are consistent with each other and with the opinion rendered by the Third Circuit in this case, such that this Court's exercise of its supervisory powers is not justified.

CONCLUSION

For all of the above reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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